86-1185

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ERNEST KETTELSON, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT ELGIN, ILLINOIS

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QUESTIONS PRESENTED

1. Whether the supremacy clause of the federal constitution preempts state remedies for damage to person and property and burden to real estate when such damage and burden is caused by focused beams of microwaves used to carry long distance telephone messages transmitted by companies which are subject to the Federal Communications Act.

2. Whether it contravenes federal policy as expressed in the Federal Communications Act for state law to require telecommunications companies who are subject to the act to obtain permission from the owners of land burdened by projection of their focused beams of microwaves therein, thereon and there across, by payment for such easements or otherwise obtaining permission from the owners, and to pay for damages to person and property caused by their projection of such microwaves.

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The petitioner Ernest Kettelson, who is also an attorney admitted to practice before this Court, for himself and on behalf of all others similarly situated as a class, petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois, Second District in this case.

OPINIONS BELOW

The opinion of the appellate court (App. A, 1a-8a) is set forth in Appendix A. The trial court's order dismissing the complaint (App. B, 10a-11a) which was

appealed from is set forth in Appendix B. The order of the Supreme Court of Illinois denying leave to appeal (App. C, 12a) is set forth in Appendix C.

JURISDICTION

The judgment of the appellate court (App. A, 9a) was entered on June 5, 1986. The Illinois Supreme Court denied leave to appeal (App. C, 12a) on October 2,1986. The jurisdiction of this Court is invoked under 28 U.S.C.1257(3) relating to any title, right, privilege or immunity set up or claimed under the Constitution or statutes of the United States. Defendant set up and claimed such title, right, privilege or immunity in the trial court by virtue of the Federal Communications Act which was alleged to preempt the state remedies sought by plaintiff by reason of the supremacy clause of the federal constitution (App. D, 13a-15a).

The trial court adopted the arguments advanced by the defendant as the basis for its decision (App. B, 10a) dismissing the complaint. The appellate court's opinion (App. A, 1a-8a) explaining its decision for which this petition for writ of certiorari is requested shows that the sole basis for its decision was federal preemption under the statute and constitutional provision referred to.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The supremacy clause of the federal constitution states as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

laws of any State to the Contrary Notwithstanding." Constitution of the United States. Article VI, Clause 2.

2. Section 414 of the Federal Communications Act states as follows:

> "Nothing in this chapter shall in any way abridge or alter the remedies now existing by common law or by statute, but the provisions of this chapter are in addition to such remedies." June 19, 1934, Ch.652, Title IV, Section 414, 48 Stat. 1099, codified at 47 U.S.C. 414 (The chapter referred to is the entire Federal Communications Act as codified in 47 U.S.C. 151-609, also cited as the "Communications Act of 1934," c.652 Title IV, Section 609, 48 Stat. 1105, codified at 47 U.S.C. 609)

3. Section 151 of the Federal Communications Act states as follows:

> "For the purpose of regulating

interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall execute and enforce the provisions of this Act.

June 19, 1934, ch. 652, Title I,

Section 1, 48 Stat. 1064; May 20, 1937, ch.229, Section 1, 50 Stat. 189, codified at 47 U.S.C. 151.

STATEMENT

Defendant MCI Telecommunications Corporation is in the long distance telephone business and uses focused microwaves to carry its customers' telephone messages along straight line pathways from one location to another throughout the United States. Plaintiff owns and resides on land which is burdened by one of the focused microwave paths used by defendant and appropriated to its own use in conducting such business. Plaintiff filed suit against defendant in the Circuit Court of Kendall County, Illinois for intentional and wrongful entry into, upon and across his property without consent, for striking living beings thereon with defendant's microwaves and for appropriation of plaintiff's property to

defendant's own use. Plaintiff asked for an injunction and damages or in the alternative an accounting and imposition of a constructive trust for the benefit of plaintiff. The counts of the complaint seeking alternative relief of an accounting and imposition of a constructive trust were made a class action on behalf of all other similarly situated property owners. Defendant filed a motion to dismiss, raising federal preemption as one of the grounds for dismissal.

The trial court granted defendant's motion to dismiss, and plaintiff appealed. The appellate court construed the complaint which it said purports to allege state common law causes of action as attempting to affect defendant's transmission of interstate telecommunications, and then said that regulation of such communication is exercised exclusively by the federal government pursuant to the

Federal Communications Act. Therefore the court held that any regulation or control the state might otherwise exert through its common law has been preempted by the federal legislation (App. A, 3a first paragraph). The appellate court also says on page 4 of their opinion (App. A, 8a), "since we have concluded that the matter before us has been preempted by federal legislation, we need not consider plaintiff's other assertions."

The Supreme Court of Illinois denied plaintiff's petition for leave to appeal in an order entered October 2, 1986.

Thus, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. 1257(3) based on defendant's claim of the title, right, privilege or immunity of federal preemption under the supremacy clause of the Constitution and provisions of the Federal Communications Act.

REASONS FOR GRANTING THE PETITION

This case presents major issues of nationwide concern in which a state court has decided a federal question of substance not heretofore determined by this court, and has decided it in a way that is probably not in accord with applicable decisions of this court. The major issues of nationwide concern which are involved in and affected by this case include the following:

1. National Health Hazard. Non-ionizing electromagnetic radiation such as that from focused microwave transmission now being used to carry long distance telephone messages is increasingly recognized as a nationwide health hazard. Extensive evidence to that effect is available for presentation at trial if and when the complaint in this case is reinstated and the decisions of the lower courts in dismissing the complaint are

reversed. Except for court action of the kind brought here, there is no effective forum for those people who are actually at risk, and have to live along easements burdened by focused microwaves projected therein and thereon, to be heard and present their own witnesses and their own evidence regarding such risks to their health.

2. National Security Problem. Using microwaves to carry messages, rather than the various other means available, makes the nation's communications network vulnerable to complete disruption for an extended period of days or even weeks from the electromagnetic pulse (EMP) which can be generated by a high altitude nuclear explosion. Also espionage interception of communications is easiest of all when microwave transmission is the means used and most difficult of all to detect that such interception is being

done, in fact practically impossible. Other means such as underground cables are virtually immune from EMP, much more difficult for spies to intercept, and much easier to detect if such interception is attempted. The decision of the Court in this case will have a direct impact on this national security issue, and either discourage or encourage a more secure communications network for the country depending on which way it rules.

3. Nationwide Investment Risk To The the General Public. Disclosure has not been made to the public to whom shares of stock in microwave telecommunications companies are being offered (1) that such companies have not acquired any enforceable rights to continue using the focused microwave easements they began to use and are still using without having gotten any permission or consent from the property owners, (2) that such easements can no

longer be used when the property owners place structures thereon which block the focused microwaves, and (3) that stock in such companies will eventually become worthless as new building development blocks more and more of such easements with the general public shareholders of such companies being the last to know. One of the attorneys for defendant in this very case acknowledged in open court that property owners can erect structures which block defendant's focused microwave transmission (App. E, 16a-20a) and defendant cannot do anything about it except try to find some other path or right-of-way not already taken by someone else or not already blocked by new building and development. Other attorneys for defendant in their appeal brief, footnote 6 on page 22 of that brief, repeated essentially the same admission (App. F, 22a). Accepting this case for decision

will serve to make such disclosures which will not otherwise be made generally known.

4. A National Policy Which Gives A Special Nationwide Concession or Subsidy to Only One Out of Thousands of Other Industries Which Do Business Nationwide Distorts Interstate Commerce and The National Interest. All other interstate businesses have to purchase (or otherwise obtain permission from the owners for) whatever real estate or personal property they need to use in carrying on such business. It would be unfair to say that telecommunications companies, and only those who elect to use microwaves as the means to carry telephone messages as opposed to other means, do not have to purchase (or otherwise obtain permission to use) the easements needed in and on which to project their focused microwave beams, but those who have chosen to use

telephone poles and wires above ground must do so, those who have chosen to use cables buried underground must do so, and those who engage in all other nationwide business and all other types of interstate commerce must do so, must purchase (or otherwise obtain permission from the owners for) whatever real estate or personal property they need to use in carrying on their interstate commerce. If companies which elect to use microwaves as the means to carry their telephone messages do not have to pay for the easements needed which all others do, that will put artificial pressure on all telecommunication companies to switch to microwaves even though that may be the least desirable means of all from the standpoint of voice quality, dependability, national security, national health, national safety, esthetics and the like. Thus, a serious nationwide distortion

results in a major, even vital, nation-wide industry by failing to require permission from the owners, by payment or otherwise, for the easements being used to beam focused microwaves therein and thereon back and forth between the various locations served throughout the country. If the Federal Communications Act were to be construed as approving such failure to obtain permission from the property owners by payment or otherwise for use of their property, as defendant in this case has tried to contend, such interpretation or construction would put that act of Congress in violation of that part of the Fifth Amendment of the Constitution of the United States which says, "nor shall private property be taken for public use, without just compensation." The defendant in the present case is not even a public utility and has not been given any power of eminent domain.

5. National Interest To Avoid Further Unnecessary Transfer of Functions To Federal Government For Which Long Standing Proven Facilities Already Exist In Every State For Performance of Such Functions. Requiring payment or other remedy for easements burdened by focused microwaves beamed therein and thereon is no different than doing the same regarding easements for poles or towers and wires, or for any other purpose, all of which have long been dealt with by the extensive body of real estate common law of each state which can be traced back to antiquity, supplemented by state statutes. No comparable body of federal real estate law even exists, and the thought of now creating one at the federal level for imposing on all of the states thereby preempting their own, for just this one small part of only one industry out of thousands of other nationwide industries

and other types of interstate commerce, is horrifying to contemplate. It would make no sense.

6. New Fact Situation of National Importance. There do not appear to be any previous reported decisions on the fact situation of focused microwaves being projected back and forth into and on to the property of others in well defined and relatively narrow easements which burden the real estate and lower its value whereas the land on either side is not so burdened or lowered in value, and which also create health risks and injury to persons living along such easements. The Court thus has an opportunity to consider this new fact situation at the outset and establish basic guidelines for subsequent cases of this kind to follow. That will promote judicial economy by knowing from the start what the basic guide lines are in this kind of case,

and hopefully will make it unnecessary to even litigate at all many cases that would otherwise be brought into court if the basic issues presented in this case had not been decided and made clear by this Court.

The issues presented in this case will enable the Court to decide two basic questions (1) whether state remedies for injury and damage to person and property resulting from focused microwaves being projected back and forth into and on to property of others without their consent are or are not preempted by the Federal Communications Act, and (2) whether it does or does not contravene federal policy as set forth in that act, for state law and state remedies to require companies who use focused microwaves as the means of carrying telephone messages from one point to another to obtain permission by payment or otherwise for whatever

easements they use, as well as to pay for whatever injury and damage they may cause, just the same as everyone else has to do including other telecommunications companies which elect to use other transmitting means. Decisions on those two basic issues will give clear guidance for lower courts to deal with similar cases when they arise, and yet leave the flexibility needed to do justice in each case.

As the health hazards and health problems caused by microwave radiation become more clear as a result of the numerous studies being done worldwide, and as the burden to real estate from focused microwaves becomes more widely recognized, the cases are bound to proliferate. Since the photon particles which make up microwaves are too tiny to be seen by the naked eye, many residents and property owners along the focused

microwave easements are not as yet even aware that they are being struck and penetrated by such microwaves and their property burdened by such microwave easements to the point others may not wish to even purchase property so burdened when the existence of the focused microwave easements become known. That is particularly true for those who live in the midpoint area between two microwave towers which are spaced apart some thirty to thirty five miles so they do not even know a microwave tower is in the vicinity. Yet those are the people most directly in the center of the focused microwave beam due to curvature of the earth and the fact that the sending antenna on one tower some fifteen miles to one side and the receiving antenna on the other tower some fifteen miles to the opposite side are each about level with the horizon for someone in the

mid-region about midway between the towers. Therefore, the straight in-line beam of microwaves, however large the diameter of that stream of microwaves may be, has its very center (where the microwaves are most concentrated) aimed at about ground level in and throughout that midpoint region between the towers. Thus, people and property throughout that midpoint region are being continuously bombarded with the very center, most concentrated part of such focused microwave beam.

In talking to other attorneys throughout the country from New York to California, a few cases similar to this have been brought but the parties defendant agreed to settle reportedly to prevent those cases from getting into the appellate reports as adverse precedents. The courts, attorneys and the parties should do just the opposite, and seek

to have these important new fact issues considered and decided so as to bring order out of the chaos and uncertainty which otherwise exist. This case gives this Court an opportunity to decide at the very outset that state remedies are not preempted and that requiring companies who elect to use microwaves as the means to carry their customers' telephone messages to obtain consent and pay for easements and whatever else they need just like everyone else does not contravene federal law. Such a decision now by this Court will prevent clogging the federal court system with this additional category of litigation once the problems, injury and damage become more clearly known to more of the people directly involved. The companies will also have a more clear understanding of their obligation and will hopefully acquire the necessary easements lawfully and

voluntarily without the need for litigation at all.

The six major issues of substantial nationwide concern set forth above which will be vitally affected by the outcome of this case make this a particularly important case for consideration by this Court. Any one of them alone, (1) the national health hazard, (2)the national security problem, (3)the nationwide investment risk to the general public, (4)a national policy which is basically unfair and distorts the normal flow of interstate commerce by singling one small segment of one industry out for a special favor not uniformly available to all, (5) the national interest in avoiding further burdening of the federal government with functions which have been handled well in the past by the states themselves, and (6) the new fact situation of obviously national importance

in a vital industry for which there are no previously established precedents, are each special and important enough reasons to justify granting this petition for certiorari and accepting this case for decision.

The specific federal question of substance not heretofore determined by this Court is whether state remedies for injury and damage caused by projecting focused microwaves into and on to the person and property of others without consent as alleged, when done by a telecommunications company subject to some of the provisions of the Federal Communications Act, have been preempted by that federal statute and the supremacy clause of the federal constitution. The Appellate Court of the State of Illinois has decided that federal question in a way that is probably not in accord with applicable decisions of this

court.

In the recent case of Capital Cities Cable, Inc. v. Crisp (1984) 467 U.S. 691, 104 S.Ct. 2694, 2700, this Court set forth the following three grounds or tests to determine whether the doctrine of federal pre-emption is applicable:

> (1) When Congress expresses a clear intent to pre-empt state law;
> (2) When it is clear, despite the absense of explicit pre-emptive language, that Congress intended by legislating comprehensively to occupy an entire field of regulation and has thereby left no room to supplement federal law; and
> (3) When compliance with both state and federal law is impossible, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Capital Cities Cable, Inc. v. Crisp (1984) 467 U.S. 691, 104 S.Ct. 2694, 2700.

As to the first test, Congress did not express a clear intent to pre-empt

state law when it enacted the Federal Communications Act. In fact it did just the opposite by providing in Section 414 that nothing in that act shall in any way abridge or alter the remedies now existing by common law or by statute, but that the provisions of the Federal Communications Act are in addition to such remedies. (June 19, 1934, ch. 652, Title IV, Section 414, 48 Stat. 1099 codified at 47 U.S.C. 414)

As to the second test, there is no indication whatever in the Federal Communications Act that Congress intended to occupy the entire field leaving no room to supplement federal law. Again, it is just the opposite since the act specifically carves out existing common law and statutory remedies as not being abridged or altered by that act, so they cannot have been pre-empted. Congress did not legislate so comprehensively

by that act that it included the category of relationships between telecommunications companies and third parties who own personal property and real estate which such companies may need or want to use in conducting their business. That entire category of relationships has been excluded. There are no provisions for the Federal Communications Commission to deal administratively with injury and damages to person and property of others caused by telecommunications companies while carrying on their business. There is nothing in the act which federal courts can turn to if they should be called upon to adjudicate a dispute or controversy between telecommunications companies and whoever's person or property they may have injured and damaged or burdened during the conduct of their business. Even if such case were brought in a federal court,

the federal court would have to look to the law of the particular state in order to decide, if in fact such federal court would have any basis for federal jurisdiction at all.

As to the third test, compliance with both state and federal law is not only possible here, but if this case were brought in federal courts they would have to apply state law since there is absolutely nothing in the Federal Communications Act regarding the real estate interests and property rights of third parties which are being infringed or appropriated by a telecommunications company.

This Court also said in Teleprompter Corp. v. Columbia Broadcasting System which dealsspecifically with the preemption issue under the Federal Communications Act:

"The FCC has consistently

contended that itis without power to alter rights emanating from other sources. . . This position is consistent with the terms of the Communications Act of 1934, the source of the Commission's regulatory power, which provides, in part:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but provisions of this chapter are in addition to such remedies. 47 U.S.C. Section 414."
> Teleprompter Corp. v. Columbia Broadcasting System (1974) 415 U.S. 394, 406, 94 S.Ct. 1129, 1137, 39 L.Ed.2d 415.

Another case in point is Louisiana Public Service Commission v. Federal Communications Commission et al, 1986, ____U.S.____, 106 S.Ct. 1890, 90 L.Ed.2d. 369. Respondents in that case relied on

the broad purposes section of the Federal Communications Act which the act starts out with in Section 151 to argue in favor of preemption, as defendant in this case has done and which the court below relied on to support its decision based on preemption. This Court in Louisiana Public Service Commission held that the general purposes section 151 had to give way to the express limitations on FCC power contained in Section 152(b), which states that "nothing in this chapter shall be construed to apply or to give the Commission juridiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . ." Ibid. 106 S.Ct. 1899.

The issue in Louisiana Public Service Commission related to the amount of depreciation of the telecommunications

companies own property which could be charged off as expense for purposes of setting rates and thereby passing such expense along to the customers. The States had their way of doing it. The FCC had a different way, arguing it thereby preempted this field of how depreciation should be determined for purposes of setting rates. This Court said no preemption even in that fact situation where the federal agency did and does have the facilities, employees, statutory authority, regulations and everything needed to perform the rate making function.

In the present case, there is absolutely nothing in the Federal Communications Act or elsewhere in the federal domain covering real estate law and remedies for burdening, damaging or appropriating real estate, nor for other injuries and damages caused to person and

property of others by telecommunications companies in the conduct of their business. Therefore, there really is no conflict between Section 414 which says that nothing in the act shall in any way abridge or alter the remedies now existing by common law or by statute, and that section itself acknowledges that the Federal Communications Act is in addition to the existing common law and statutory remedies. The statute itself if given its plain meaning comes right out and says there is no conflict between what already exists and what new things the act provides in addition. Certainly Congress did not intend by the general, grandiose, almost philosophical language of the beginning Section 151, such as "to make available. . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with

adequate facilities at reasonable charges. . . ," that companies in that business could go out and burden, appropriate and damage other people's property without paying for it in order to be able to get "adequate facilities" at no cost so they could provide service at "reasonable charges" that way.

The telecommunications companies themselves made a big enough case out of Louisiana Public Service Commission for this Court to consider where the issue of depreciation was involved and the ability to pass on to customers the decrease in value of their own property. Congress obviously intended that the cost of property used in providing the service should be included in "reasonable charges" as set forth in Section 151, including the companies' own property. Certainly the cost of using the property of other people, including whatever damage or

burden may be caused, of people who make no profit out of the business and have no say in how the businesses are run, is within the meaning of "reasonable charges" as intended by Congress. That appears to be the specific reason it included Section 414 leaving existing remedies intact. That section can be looked at as incorporating by reference the entire existing framework of state common law with all of its remedies supplemented by statute into the Federal Communications Act itself, and saying all of that framework remains as it is in state hands so there is no need for the federal government and the communications act itself to get involved in that area and duplicate what already exists.

If depreciation in value of telecommunications companies' own property and whether it is preempted or not is a big enough case for this Court to take for

consideration, it would seem that depreciation in value of the property of thousands if not millions of third parties adversely affected by what those companies are doing and whether that subject area is preempted or not should also be a big enough case for this Court to take for consideration.

In any event, in view of the foregoing decisions by this Court, the decision of the lower appellate court appealed from herein appears to be in error regarding the federal question of preemption and it's applicability to the facts of this case.

The six national issues specifically identified above which will be vitally affected by how the Court decides this case are not only important as a matter of principle or policy but also in scope as evidence at the trial will ultimately show. A sampling of the kind of evidence

that will be offered includes the following.

The national health risk from microwave radiation involves such serious diseases as leukemia, other types of cancer, glaucoma and other very serious diseases. A recent study at Johns Hopkins University Applied Physics Lab indicates that microwave radiation may even influence the development of Alzheimer's disease according to Dr. Sam Koslov, a member of that group, speaking at the Environmental Protection Agency's public meeting in Washington, D.C. on September 2, 1986. Dr. Richard Phillips of the EPA told a meeting of the International Utility Symposium on the Health Effects of Electric and Magnetic Fields during the week of September 16, 1986 in Toronto that he would not buy a house along a power line right-of-way, such lines emitting electromagnetic radiation

of the non-ionizing kind similar to that from focused microwaves beamed along an easement comparable to that used by power lines. . . . Phillips is also reported to have said that one cannot refuse to accept the biological data any longer that electromagnetic radiation of this type presents a significant health risk. Electric power lines have visible wires or cables strung overhead so people know they are there, whereas focused microwaves are not visible to the naked eye and many people being bombarded by the electromagnetic radiation from that source have not been so informed. Since people can see power lines and know whether they are in or affected by such power line easements, a few cases have been brought regarding the health risk aspect of non-ionizing electromagnetic radiation from that source. Two such cases in Florida awarded substantial

damages for the health risks posed by such electromagnetic radiation. Florida Power & Light Co. v. S.B.Jennings a/k/a S.Bryan Jennings, Jr. et al, 485 So.2d. 1374, (Fla.App. 1 Dist. 1986) opinion filed April 4, 1986. Also, Florida Power & Light Co. v. Virginia S. Roberts, et al, 490 So.2d. 969 (Fla.App. 5 Dist. 1986) opinion filed June 5, 1986. Judgment for $1,600,000.00 was awarded to plaintiffs in the Jennings case, and for $1,800,000.00 in the Roberts case. A state court jury in Houston, Texas awarded $25,100,000.00, which included punitive damages, to the Klein Independent School District in its suit against Houston Lighting and Power Company for running a power line across school property exposing children to non-ionizing electromagnetic radiation. Klein Independent School District v. Houston Lighting and Power Company,

County Civil Court at Law No.1, Harris County, Texas, Case No. 393-755. That case is on appeal. The judgment cited the defendant utility for reckless disregard of children's health in running its power line across school property, and as mentioned the judgment included punitive damages.

The electromagnetic spectrum from the longer wave length or lower frequency end to the higher includes radio and television waves, microwaves, infra red, visible light, ultra violet, X-rays and gamma rays. The upper end of the spectrum includes ionizing nuclear radiation or gamma rays which everyone has long recognized as being harmful, and the lower end of the spectrum includes the non-ionizing type of electromagnetic radiation from power lines and microwave transmission of telephone messages. The recognition that this kind of non-ionizing

radiation in the microwave portion of the spectrum poses a serious health risk is only now beginning to be acknowledged by the scientific and medical communities with expert witnesses available to prove such health risks in court, and that they are substantial enough and clear enough to justify awards in the millions of dollars range as well as punitive damages. In other words, the kind of nationwide health risk involved in this class action case is not only substantial in principle but in scope as well.

The same is true for the national security problem. It is not only of utmost importance in principle, but nothing could be more important in scope than a nationwide communication system for the civilian population as well as the military which can survive a nuclear attack and continue to function thereafter.

Nothing would be more catastrophic than knocking out a country's communication system in a time of war. Choosing microwaves as the means on which to build this country's long distance telephone network could prove to be a fatal mistake from a national security standpoint in view of the ease by which such entire network could be rendered useless for an extended period by the electromagnetic pulse (EMP) from a single high altitude nuclear explosion. By accepting this case and declaring it does not contravene federal policy for state law to require companies who elect to use the focused microwave means of carrying telephone messages to pay for the easements used, the Court would remove the artificial incentive which has compelled all long distance phone companies to switch to the microwave means of carrying phone messages when one company did. The

defendant in this case claims to be the one which did pioneer and initiate the use of microwaves to carry long distance telephone messages. Actually the use of microwaves to carry voice messages is not new technology, nor is the use of parabolic antennae to focus the microwaves in a concentrated beam rather than broadcast in a three hundred and sixty degree radius. How to do those things goes back to the daysof Marconi and the earliest days of radio when scientists first learned how to modulate radio waves and microwaves to carry voice messages and experimented with all the various types of antennae to send and receive such messages, both in a focused beam and broadcast in a 360 degree radius. That means of carrying telephone messages was not chosen by phone companies for almost a hundred years after its discovery because it was inferior in so

many ways to wire and cable. The sole reason for switching to microwaves in recent years appears to be the artificial subsidy of not having to pay for the easements used at least up till now. The newest technology in this field of carrying telephone messages is the development of tiny tubes of glass fibers, bundling together in cables, and new ways to bury telephone cables underground rapidly and at low cost. Underground cables would be the most secure of all from a national security standpoint, immune from the EMP from a high altitude nuclear explosion, more difficult for spies to locate and intercept communications from, and much easier to detect if that were being done. Normal economic incentives should have caused this superior means which truly is the result of new technology, to come to the forefront for universal adoption by all

companies in the field. If the courts and other agencies of government had made clear from the outset that companies electing to use the focused microwave means would have to pay whatever amount necessary to obtain the consent of the owners whose land is burdened by such easements, there would have been no artificial advantage to resurrect that less desirable century old technology of microwave transmission, and no artificial skewing away from what the normal economic forces and incentives would have otherwise brought about. Granting this petition for certiorari and taking this case will also direct attention of other agencies and departments of the federal government to the national security aspect. They may as a result of such attention by the Supreme Court decide to take more direct action to bring about a change from microwaves to

a more secure means such as underground cables for the nation's communications network for reasons of national security.

The nationwide investment risk to the general public is also as substantial in scope as it is in principle. Defendant's attorneys in this case have admitted the defendant has obtained no enforceable right to the easements in which and on which it projects its focused microwaves. Yet as far as the general public and others are concerned, that is what appears to be the most valuable asset the defendant supposedly owns. As pointed out to the courts below (App. G, 23a), IBM Corporation recently purchased a 16% interest in the defendant company at a price of some $400 million for access to defendant's "major transmission network." That works out to $2.5 billion dollars for a 100% interest or the total value of such

"major transmission network" which defendant's own attorney has acknowledged his client has acquired no rights to and for which defendant itself has never made any payment. The scope or dollar amount for this item is therefore also substantial, as is the principle or policy issue itself of nationwide investment risk to the general public. Granting this petition and taking this case for consideration by the Supreme Court will draw everyone's attention to the fact that defendant has not acquired any enforceable right to use the easements needed to continue its operations, and will make such disclosure to the public for protection of at least those who may be considering purchase of stock in the defendant company at some time in the future. If no opportunity is given to try this case and disclose such information to the general public by that means,

defendant itself appears to have no intention of making such disclosure to the general public who may purchase stock in defendant corporation which they would not have purchased had full public disclosure been made.

The fourth item of a special nation-wide concession or subsidy whereby one segment of one industry does not have to pay for real estate easements it uses, nor damages to those whose real estate is burdened by such easements whereas every-one else does have to do so, and the economic distortion which that causes to interstate commerce, is also as sub-stantial in scope as it is in principle. When defendant began to use microwaves as the means for carrying long distance telephone calls without paying for the easements being used all of the other competitors in this field of long dis-tance telephone service had to follow

suit as a matter of economic necessity. When something that one competitor does causes all of the other competitors to follow suit, not just some of them but all of them, that is as substantial in scope as one can get as far as this item of special subsidy and economic distortion of interstate commerce is concerned.

The fifth item, that it is in the national interest to avoid and prevent further transfer of functions to the federal government from state governments which have been handled well in the past by the states, is also as substantial in scope as in principle or as a matter of policy. What would be involved here if the federal government were held to have preempted state remedies for injury and damage to and for appropriation of real estate as the courts below have held in this case, is nothing less than creating

a whole new body of federal law for real estate with new federal agencies or expansion of old ones to administer, clogging the federal court system with yet another category of cases creating conflict and utter chaos as far as existing real estate law of the various states is concerned. If there is any one subject area the federal government should want to stay out of it is real estate. It has always been a fundamental principle of law that where real estate is concerned it should always be dealt with at the most local level of government in which the real estate is located, even down to the level of each county in which the real estate happens to be.

The sixth item of "new fact situation of national importance" is also as substantial in scope as in principle. The microwave easements used by defendant alone cover the entire United States and

extend between all or almost all of the major cities. Those used by the other long distance telephone companies will also be affected by the Court's ruling in this case, as well as by the Court's failure to grant certiorari if that should be the case, and their microwave easements also cover the entire United States and extend between all of the major cities. This case has been made a class action insofar as the relief of an accounting and constructive trust are concerned, so the scope of this item is also about as substantial and as important as it can ever be in any given case. The principle or policy aspect of being a new fact situation not previously considered in any previously reported decision is also of particular importance in this case. It will move our existing body of law forward into an important new area to deal with a modern day fact

situation but in the same way, and in the same direction forward, as the rest of our legal framework has been developed if the ruling is ultimately that users of microwave easements have to obtain the landowner's permission by payment or otherwise pay for injury and damage to the land burdened thereby and to persons living along such easements, the same as everyone else has to do if they want to use or burden another's property for some purpose, or if they injure or damage another's person or property in carrying out such purpose.

A few comments should be made regarding the lower court's reference to Section 301. That court appears to believe that "channels of radio transmission" referred to in Section 301 mean the real estate easements which are burdened by the focused microwaves beamed therein and thereon by defendant. Many

words have two completely different meanings. The word "channels" with reference to radio transmission means the frequency bands, or cycles per second of radio wave transmission, which separate one radio and TV station or "channel" from another as the station or channel selecting dial is turned. It does not mean a pathway or geographic easement as used in Section 301. Radio and television transmissions are not in fact focused in any particular geographic path or direction at all, but are broadcast and diffused in all directions equally throughout the entire 360 degree radius from the transmitter. They have no relevance to this case whatever for that reason and many others.

The focused microwave beams which defendant projects into, on to and across the land of plaintiff and members of the class, are projected back and forth in

that single direction between each point A and point B. Such straight line beams of microwave radiation extend vertically from ground level up to about three hundred feet and are about the same dimension in width. Due to curvature of the earth, towers have to be provided at thirty to thirty five mile intervals along each easement to catch the focused stream of microwaves and prevent them from continuing off on their straight line path into space. Each tower supplies additional power and redirects the stream of focused microwaves downward again to earth, aimed at the next tower beyond the horizon some thirty or so miles distant thereby keeping the stream of microwave radiation at ground level throughout the entire easement or path between point A and point B extending upwardly from ground level three hundred feet and about the same distance

in width throughout the pathway or easement.

The towers themselves impose a burden on the land which also lowers its value, and while defendant does obtain permission from the landowners on whose specific piece of land the towers themsevles are placed,'usually by payment, defendant did not obtain permission from plaintiff whose land adjacent to a tower is burdened and depreciated in value thereby. In fact, defendant placed its tower next to plaintiff's property in defiance of plaintiff's prior objection. Plaintiff had even offered to pay defendant a substantial sum of money if it would move the placement of its intended tower enough so plaintiff's property would not be adversely affected by the tower and stream of focused microwaves, which offer defendant rejected and thereafter constructed the objected to tower.

Therefore, this case also includes as a minor element the burden to land and depreciation of value caused by proximity to the towers themselves. However, the big issue in this case is the burden to land caused by the ground hugging stream of focused microwave radiation following the curvature of the earth from tower to tower throughout each easement or geographic path from each point A to point B, and the injury to persons living along such easements who are continually bombarded and penetrated by such microwave radiation. Obviously all the detail facts cannot be set forth in the limited space of a petition for a writ of certiorari. If plaintiff's complaint is reinstated so there will be an opportunity for trial, the full set of facts will demonstrate convincingly the enormity of the health risk and of the burden to land, as well as the complete difference

between defendant's uses of a focused beam of microwaves to carry long distance telephone messages and radio and television broadcaster's use of radio and television waves to broadcast radio and television programs.

We concentrate here on the legal aspects, the two specific questions presented, and the six major issues of nationwide concern which are going to be affected in a very substantial way by however this Court decides those two questions, namely (1) the national health risk from microwave radiation, (2) the national security problem from choosing microwaves as the means on which to base this country's communication network, (3) the nationwide investment risk from failure to publicly disclose lack of any enforceable right to the geographic pathways or easements telecommunications companies need to use

for their focused microwave transmissions, (4) nationwide distortion of normal economic forces which has artificially caused all long distance phone companies to switch to the microwave method of carrying phone messages by failing to require those who use that method to obtain permission from those whose property they need to use and burden by such use whereas companies who use other methods of transmission are required to obtain such permission by payment or otherwise, (5) the national interest to avoid further burdening of the federal government with matters already handled well by state law, and (6) the new fact situation of national importance presented here for which there do not appear to be any previously reported decisions specifically in point although the recent power line cases cited above are analogous as far as the national health risk issue

from electromagnetic radiation is concerned.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Ernest Kettelson

Ernest Kettelson,
Petitioner and Attorney

Date: December 18, 1986

Ernest S. Kettelson
KETTELSON LAW OFFICES, LTD.
Barr Professional Building
1520 Rock Run Drive
Joliet, Illinois 60435
815/741-1100

APPENDIX A

This Order Is Not Precedential
And Not To Be Published

Filed June 5, 1986
Loren J. Strotz, Clerk
Appellate Court, 2nd District

No. 2-85-281

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ERNEST KETTELSON, Plaintiff-Appellant, v. MCI TELECOMMUNICATIONS CORPORATION, Defendant-Appellee	)	Appeal from the Circuit Court, for the 16th Judicial Circuit, Kendall County, Illinois. Honorable James W. Cadwell, Judge Presiding.

ORDER OF THE APPELLATE COURT PURSUANT TO SUPREME COURT RULE 23

Plaintiff, Ernest Kettelson, appeals from a trial court order which dismissed his first amended complaint for failure to state a cause of action and denied his

motion to vacate an earlier order which had dismissed his original complaint, also for failure to state a cause of action. On appeal plaintiff contends: (1) that his original complaint sufficiently stated a cause of action for wrongful entry by the defendant onto his property, or, alternatively, that the Illinois Constitution requires that he be provided a remedy; (2) that his amended complaint sufficiently stated the elements necessary for imposition of a constructive trust; and (3) that a class action is appropriate to seek imposition of a constructive trust. Since the parties are well aware of the background of this case the only facts included in this discussion are those necessary for disposition.

While plaintiff purports to allege State common law causes of action and seeks relief from the State courts, we find that plaintiff is attempting to affect

defendant's transmission of interstate telecommunications, and that regulation of such communication is exercised exclusively by the Federal government pursuant to the Federal Communications Act (the Act). (47 U.S.C., sec. 151 et seq. (1976).) Therefore, any regulation or control the State might otherwise exert through its common law has been preempted by the Federal legislation.

Defendant acknowledges the principles of preemption as well as their application in the general area of telecommunications activity. Nevertheless, he characterizes the Act as a limited preemption which does not include State regulation of property owner relationships with telecommunications broadcasters. While we appreciate that not all activities of interstate communications companies are exempt from State control, the facts of this case indicate that restriction of the kind sought by plaintiff

has been preempted by the Act.

The intent to preempt the kind of State regulation sought by plaintiff is discernible in the Act itself. Plaintiff strenuously objects to the use of air space above his property for transmission of MCI's telecommunications and seeks intervention by the State courts. However, the Act makes clear that Congress fully intended that the pathways of communication should be controlled at the Federal level. Section 301 states:

> "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of ***time, under licenses granted by Federal authority,
>
> No person shall use or operate any apparatus for the

> transmission of energy or communications or signals by radio *** except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter." (47 U.S.C.A., sec. 301 (West Supp., 1985)

The channels referred to above are precisely those paths, or rights-of-way utilized by MCI, of which plaintiff complains.

Plaintiff relies on the savings clause of the Act (47 U.S.C.A., sec 414 (1976)) to support his position. The clause suggests that the remedies provided by the Act merely supplement, and do not supplant, State remedies that existed before the Act was adopted. The savings clause, however, has not successfully barred preemption where State regulation would frustrate the purpose of the Act. (Lazar v. MCI Communications Corp. E.D. Mich.(1984), 598 F. Supp. 951; Ivy Broadcasting Co. v. American Telephone & Telegraph Co. (2d Cir. 1968), 391

F.2d 486.) One obvious purpose of the Act is uniformity. At the heart of the Ivy court's discussion of preemption was the intent of Congress, as expressed in the Act, to maintain uniformity of rates and services throughout any interstate system of telecommunications. Conversely, the court perceived a clear intent to preclude the states from acting in the areas of rates and services in order to avoid subjecting interstate service, as well as corresponding rates for service, to divergent and possibly conflicting State laws.

Despite defendant's protestation that he seeks redress for a State common law trespass and nothing more, if the remedies he seeks were to be implemented, the result would be the most direct, obvious, and drastic disruption of interstate telecommunications imaginable. The carriers would have to either move and rearrange all of their transmitting equipment with no

guarantee that they would not have to move again in the future, or assume the burden of compensating every owner of property located under the paths created by their transmissions. The character of telecommunications in this State would necessarily change. Presumably, the character of telecommunications could vary widely, and even conflict, from State to State. There could be no more telling blow to the uniformity and efficient service and reasonable charges sought after by the Federal Communication Act in the area of interstate telephone communications. And this does not even consider the far broader implications that plaintiff's suggestions would have for the entire telecommunications field, including radio and television.

If plaintiff's remedy were to be implemented, the communication channels would be controlled by the States rather than the FCC. To allow each State to regulate the

use of microwave airspace would completely defeat the purpose of the Act and hopelessly frustrate national policy as expressed in the Act We hold that the State restriction prayed for her would be an overwhelming obstacle to the achievement of the full purposes and objectives of Congress, and is therefore preempted. Capital Cities Cable, Inc. v. Crisp (1984), 104 S.Ct. 2694, 2700

Since we have concluded that the matter befo us has been preempted by Federal legislation, we need not consider plaintiff's other assertions. Therefore, in accordance with the views expressed above, we affirm the order of the trial court of Kendall County.

AFFIRMED.

HOPF, REINHARD, STROUSE, JJ.

State of Illinois
Appellate Court Second District
Elgin, 60120
Office of the Clerk
312/695-3750

6/05/86

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen No. 2-85-0281
Title: Ernest Kettelson, Appellant v. MCI Telecommunications Corp., Appellee.

The judgment of the Circuit Court of Kendall County is affirmed.

(See attached order.)

LOREN J. STROTZ, Clerk

cc: Ernest S. Kettelson
Jenner & Block
James A. Geocaris
Richard J. Gray

APPENDIX B

16th Judicial Circuit
County of Kane
P.O. Box 556
Courthouse, Geneva, IL. 60134
Telephone (312)232-2400
James W. Cadwell, Judge
In Chambers

March 5, 1985

Mr. Ernest S. Kettelson
Kettelson Law Offices, Ltd.
3131 West Jefferson Street
Joliet, Illinois 60435

Mr. David A. Handzo
Jenner & Block
One IBM Plaza
Chicago, IL. 60611

Subject: Ernest Kettelson vs. MCI Telecommunications Corp., a Corporation
Gen. No. 83-CH-59

Gentlemen:

The Plaintiff's motion to vacate and set aside the order of dismissal entered July 5, 1984, is denied for the reasons set forth in Defendant's Memorandum in Opposition to Plaintiff's Motion to Vacate, filed November 2, 1984.

Plaintiff's First Amended Complaint is dismissed for failure to state a cause of action. The reasoning set forth in Defendant's memo in support of its motion to dismiss the First Amended Complaint (filed

October 15, 1984) as well as Defendant's reply to Plaintiff's brief in opposition to Defendant's motion to dismiss, (filed November 19, 1984) is accepted by this court as the basis for its decision.

And, attention is called to my letter dated June 19, 1984, wherein the reasons for the dismissal of the original complaint were stated.

Therefore, all counts of Plaintiff's complaint are dismissed with prejudice.

/s/ James W. Cadwell
James W. Cadwell, Judge
16th Judicial Circuit
of Illinois

RECEIVED
March 6, 1985
Kettelson Law Offices, Ltd.

APPENDIX C

63746 ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706

October 2, 1986

Mr. Ernest Kettelson
Attorney at Law
1520 Rock Run Drive
Joliet, IL 60435

No. 63746 - Ernest Kettelson, petitioner, v. MCI Telecommunications Corporation, respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition to appeal as a matter of right or leave to appeal in the above entitled cause.

Simon, J., took no part.

The mandate of this Court will issue to the Appellate Court on October 24, 1986.

RECEIVED
Oct. 06, 1986
Kettelson Law Offices, Ltd.

APPENDIX D

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT
KENDALL COUNTY, ILLINOIS

ERNEST KETTELSON	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 83 CH 59
	)	
MCI TELECOMMUNICATIONS CORPORATION,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE

On July 5, 1984, this court dismissed plaintiff's original complaint, pursuant to defendant's motion, for failure to state a claim for trespass, and granted plaintiff leave to file an amended complaint. Plaintiff filed that amended complaint on July 26, 1984.

Plaintiff now seeks, through his motion to vacate, to add to his amended complaint the counts previously dismissed. Nothing in the motion to vacate warrants reversal of this Court's well-considered Dismissal Order.

II. Federal Preemption Applies to the Interstate Telephone Facility at Issue.

Under the preemption decision previously cited by MCI, North Carolina Utilities Commission v. Federal Communications Commission, 552 F.2d 1036 (4th Cir. 1977), facilities used in both interstate and intrastate telecommunications, such as the MCI signal tower at issue here, are subject to preemptive federal regulation by the Federal Communications Commission. This decision dealt with telephone terminal equipment used mostly for intrastate, but also for some interstate, communications. The court held that the federal regulatory scheme for telecommunications established by the Federal Communications Act and administered by the Federal Communications Commission preempted any state regulation of the equipment.

In the face of this most relevant decision, plaintiff cites dicta from an

plaintiff delays. Bowman v. County of Lake, 29 Ill.2d 268, 280, 193 N.E.2d 833, (1963) and Hoskins v. Chicago Park District, 380 Ill. 78, 43 N.E.2d 546 (1942). Plaintiff's 15 year delay amounts to laches and bars his claim for equitable relief in Count II.

Conclusion

Plaintiff's motion to vacate is unsupported by any relevant new facts or any controlling precedent. Plaintiff's ill-founded attempt to apply trespass to the transmission of MCI's signals, an attempt which, if successful, would throw into chaos the entire modern system of radio and television broadcasts and long distance telecommunications, should once again be rejected by this Court. Accordingly, plaintiff's motion to vacate should be denied.

Respectfully submitted

MCI TELECOMMUNICATIONS CORPORATION

By: /s/James A.Geocaris
One of Its Attorneys

APPENDIX E

STATE OF ILLINOIS) Filed July 26, 1984
)SS. Shirley R. Lee
COUNTY OF KENDALL) Clerk of the Circuit
Court, Kendall County
Illinois

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT
KENDALL COUNTY, ILLINOIS

ERNEST KETTELSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 83 - CH - 59
	)	
MCI TELECOMMUNICATIONS CORPORATION, a corporation,	)	
	)	
	)	
Defendant.	)	

Motion to Vacate and Set Aside
the Order of Dismissal
Entered July 5, 1984

Now comes plaintiff herein, by his attorneys Kettelson Law Offices, Ltd., and asks this court to set aside its order dated July 5, 1984 dismissing the complaint herein.

In support of this motion, plaintiff states as follows:

1. Defendant's attorney stated at the hearing on April 13, 1984, that if

plaintiff erected buildings or otherwise used his property in a way that blocked defendant's microwaves from being transmitted across plaintiff's property that would be defendant's problem, that plaintiff has the acknowledged right to use the portion of his property now utilized by defendant, and that defendant would in such event have to find some other path or right of way in which to transmit its microwaves.

2. Defendant does not claim any legal right to use plaintiff's property; nevertheless as set forth in paragraph 2 of the complaint, defendant is alleged to have entered into, upon and across the said premises belonging to defendant into, upon and across plaintiff's premises, and continues to do so.

3. Plaintiff has objected to such use.

4. Therefore, based on the

representations of defendant's attorney in open court, defendant's conduct is an admitted transmission of something on, into and across plaintiff's property, which plaintiff himself could stop by self help.

5. If the undersigned as plaintiff a has right to stop the complained of conduct by self help acknowledged in open court, the court has a right and a duty to so act when requested as a preferable substitute for self help.

6. An affidavit by plaintiff in support of this motion is submitted herewith.

WHEREFORE, plaintiff asks this court to vacate and set aside its order entered July 5, 1984 dismissing the original complaint herein alleging trespass, and to give defendant a set time to answer or otherwise plead to the original complaint.

Respectfully submitted,

KETTELSON LAW OFFICES, LTD.

STATE OF ILLINOIS)
) SS.
COUNTY OF KENDALL)

Affidavit In Support of Motion
To Vacate and Set Aside
Order of Dismissal
Entered July 5, 1984

The undersigned, being first duly sworn on oath, deposes and says:

1. That he is the plaintiff in Case No. 83-CH-59, presently pending in Kendall County Circuit Court and has personal knowledge of the facts set forth herein.

2. That he was present in this court on April 13, 1984, and heard the representations of David Handzo, attorney for MCI Telecommunications Corporation, defendant in said case, made on behalf of said defendant.

3. That said attorney said at such time and place, words to the effect that if the undersigned, plaintiff in said case, erected buildings or otherwise used

his property in a way that blocked his client's (MCI Telecommunications Corporation's) transmission of microwaves from going through and across such property, that such event would be his client's problem, that the undersigned would have the right to make such use of his property (which is the subject matter of this suit), and that his client would have to find some other way to transmit their microwaves to the desired destination.

Further affiant sayeth not

_____
Ernest Kettelson

STATE OF ILLINOIS)
) SS.
COUNTY OF KENDALL)

Subscribed and sworn to
before me this ___day of
_____, 1984.

_____
Notary Public

APPENDIX F

In this case, plaintiff asks the court to create new law to interfere with an activity that has occurred for decades, the transmission of radio waves through open space. Nothing in the Illinois Constitution compels this court to do so.6/

FEDERAL PREEMPTION AND LACHES APPLY TO THIS THE LONG-DISTANCE SIGNAL TRANSMISSION AT ISSUE

A. Regulation of the Interstate Transmission of Long-Distance Telecommunications Signals is Preempted by Federal Law

In this lawsuit, plaintiff seeks to affect through state common law MCI's transmission of interstate telecommunications. Plaintiff may not use state law to this end because the federal government has occupied the field of interstate telecommunications, and thereby has preempted state regulation of the interstate transmission of communications.

6/ (See Next Page for Footnote)

6/ Plaintiff's argument that it must have some cause of action because he could block MCI's signals himself by erecting some structure on his property (Appellant's Brief at 18-19) does not save his deficient complaint under Article 1, Section 12. While MCI has no prescriptive rights over plaintiff's property or airspace, MCI, like any radio or television station, can send its signals through the air over that property in its present undeveloped state. If and when plaintiff does something that he has a legal right to do on his property that interferes with MCI's signals, MCI will have to change its system accordingly. In the meantime, nothing compels the courts to create a new common law cause of action to stop MCI's transmission through the open air over plaintiff's land.

APPENDIX G

they are to the property owners affected by the activities complained of, and the amounts involved in both cases are huge. As pointed out to the Appellate Court,[1] IBM Corporation paid some $400 million dollars for only a 16% interest in the "major transmission network" which defendant MCI claims to have the right to sell even though it has never purchased and paid the property owners for the easements which go to make up such "major transmission network." Using that measure of value, the entire network of easements plus spaced apart poles or towers would be worth two and a half billion dollars. It is doubtful that IBM Corporation would allocate any substantial amount of that total to the spaced apart poles or towers and associated hardware which is depreciable to zero value in a relatively short period of time, and which IBM has the electronic expertize

to duplicate by itself with probably a higher degree of competence than that of the relatively new corporation which is the defendant in this case. The issue of whether Party A can sell something to Party B for which the owners themselves have not been paid, and not account to the owners but keep the money himself, is itself a question of general importance. Should Party A in such case be made a trustee for the benefit of the owners for appropriation of their property as the complaint requests for one of the alternative remedies?

The questions presented in this case also involve the existence of a conflict between the decision sought to be reviewed and previous decisions of the Supreme Court.

---

1. Page 37 of Appellant's Brief citing an article in the Chicago Tribune dated June 26, 1985.

Supreme Court, U.S.
FILED
FEB 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ERNEST KETTELSON,

Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

BARRY SULLIVAN *
JAMES A. GEOCARIS
BRADLEY P. NELSON
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Respondent

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED*

Whether the Illinois Appellate Court erred in holding that petitioner's purported state law action, challenging respondent's transmission of microwave signals from a federally-permitted telecommunications transmitting facility, was barred by well-established principles of federal preemption law, a holding which does not conflict with any prior holding of this Court or any state or federal appellate court.

* Petitioner Ernest Kettleson is an individual. Respondent MCI Telecommunications Corporation is a wholly-owned subsidiary of MCI Communications Corporation, which has no subsidiaries that are not wholly-owned. The following are affiliates of MCI Telecommunications Corporation: MCI Transponder Leasing, Inc.; MCI/TAS Corp.; MCI Cellular Telephone Co.; MCI Air Signal of California, Inc.; MCI Air; MCI Services Corp.; MCI Galaxy III Transponder Leasing, Inc.; MCI Equipment Acquisition Corp.; MCI Data Processing, Inc.; Advantage Co., Ltd.; MCI International, Inc.; Western Union International, Inc.; MCI International Telecommunications Corp.; WUI Sales Corp.; WUI Service Corp.; Western Union International, S.R.L.; Western Union International, A.R.L.; S.A. Western International, N.V.; Western Union International, N.V.; Western Union International, Gmbh; British Western Union, Ltd.; and Western Union International, S.A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ERNEST KETTELSON,

Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The order of the Circuit Court for the 16th Judicial Circuit, Kendall County, Illinois (Pet. App. 10a) is not reported. The order of the Illinois Appellate Court, Second District (Pet. App. 1a) is an unpublished order which may not be cited as precedent under Rule 23 of the Illinois Supreme Court Rules, Ill. Rev. Stat. ch. 110A, § 23 (1985). The order of the Illinois Supreme Court denying the petition for leave to appeal (Pet. App. 12a) is not reported.

ADDITIONAL STATUTE INVOLVED

Section 214 of the Federal Communications Act, 47 U.S.C § 214 (1982), states:

> (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . .
>
> * * *
>
> (c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment or service covered thereby.

STATEMENT OF FACTS

1. The Parties.

Petitioner Ernest Kettelson, an attorney, has owned a certain parcel of land in Kendall County, Illinois since July 1, 1968. Respondent MCI Telecommunications Corporation ("MCI") is a telecommunications common carrier licensed by the FCC to transmit long-distance telecommunications messages through, among other things, the transmission of microwave signals. At about the time that petitioner purchased his Kendall County property, MCI erected two transmitting towers nearby. MCI uses these towers, with the approval of the FCC, as part of its nationwide telecommunications system, which transmits microwave signals over countless parcels of land throughout the United States. (Ill. App. 2.)[1]

2. The State Trial Court Proceedings.

In petitioner's original Complaint, which was filed in the Circuit Court for the Sixteenth Judicial Circuit, Kendall County, Illinois, on December 23, 1983, he claimed that MCI's transmission of intangible microwave signals over his property constituted a continuing trespass. Petitioner claimed that he was entitled to damages for MCI's past transmissions, and he also sought an injunction prohibiting all future transmissions. MCI filed a motion to dismiss, which was granted on July 5, 1984. At the same time, the Circuit Court granted leave to amend. (R. C-4 to C-7; Ill. App. 2.)

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[1] The abbreviation "Ill. App." will be used in this brief to refer to the Appendix attached to MCI's Answer to Petitioner's Petition for Leave to Appeal, which was filed in the Illinois Supreme Court on July 5, 1986. "R." refers to the common law record.

On July 26, 1984, petitioner filed his Amended Complaint, which consisted of four counts and added two new claims. First, petitioner asked that the Circuit Court impose a constructive trust on MCI because of its allegedly wrongful transmission of signals over his property. Second, petitioner also sought constructive trust relief on behalf of a purported nationwide class of persons over whose property MCI transmits any of its telecommunications signals. In addition, petitioner asked that the Circuit Court set aside its order of July 5 and reinstate the claims contained in his original Complaint. (R. C-59 to C-64; Ill. App. 3.)

MCI moved to dismiss petitioner's Amended Complaint and opposed his motion to reinstate the original Complaint. MCI argued that neither the original Complaint nor the Amended Complaint stated a valid state law claim for trespass or for constructive trust, and that such claims were preempted by federal law in any event. On March 5, 1985, the Circuit Court, after reviewing the briefs and hearing oral argument, dismissed petitioner's Amended Complaint and denied his motion to vacate the July 5 order. (Ill. App. 3; Pet. App. 10a-11a.)

3. The State Appellate Court and Supreme Court Proceedings.

On appeal to the Illinois Appellate Court, Second District, the parties briefed all issues previously raised in the Circuit Court, including federal preemption. Petitioner's appeal was argued orally on April 15, 1985, but petitioner failed to appear for the argument.

On June 5, 1986, the Appellate Court affirmed the judgment of the Circuit Court in an unpublished, non-precedential order entered pursuant to Illinois Supreme Court

Rule 23, Ill. Rev. Stat. ch. 110A, § 23 (1985).[2] Observing that not all activities of interstate communications companies are exempt from state control, the Appellate Court held that the restrictions of the kind sought by petitioner, which would substantially disrupt the physical transmission network, have been preempted by federal law. Because of its holding on the preemption issue, the Appellate Court had no occasion to reach the state law issues raised by MCI. (Pet. App. 8a.)

The Appellate Court based its holding on the Federal Communications Act, 47 U.S.C. §§ 151, *et seq.*, which comprehensively regulates interstate telecommunications. The Appellate Court found that one of the fundamental purposes of the Act is to maintain uniform rates and services throughout our system of interstate telecommunications. The court then found that the state law remedies which petitioner sought would undermine this fundamental purpose. The Appellate Court reasoned (Pet. App. 6a-7a):

> [I]f the remedies he [petitioner] seeks were to be implemented, the result would be the most direct, obvious, and drastic disruption of interstate telecommunications imaginable. The carriers would have to either move and rearrange all their transmitting equipment with no guarantee that they would not have to move again in the future, or assume the burden of compensating every owner of property located under the paths created by their transmissions. The character of telecommunications in this State would necessarily change. Presumably, the

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[2] The Appellate Court entitled its ruling, "Order of the Appellate Court Pursuant to Supreme Court Rule 23" and noted at the upper margin that "[t]his order is not precedential and [is] not to be published." (Pet. App. 1a.) Under Illinois Supreme Court Rule 23, such orders have no precedential value. Ill. Rev. Stat. ch. 110A, § 23.

> character of telecommunications could vary widely, and even conflict, from State to State. There could be no more telling blow to the uniformity and efficient service and reasonable charges sought after by the Federal Communication Act in the area of interstate telephone communications. And this does not even consider the far broader implications that plaintiff's suggestions would have for the entire telecommunications field, including radio and television.

Petitioner subsequently filed a petition for leave to appeal in the Illinois Supreme Court. The petition for leave to appeal was denied, without dissent, on October 2, 1986. (Pet. App. 12a.)

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the unpublished, non-precedential order of the Illinois Appellate Court does not conflict with any prior decision of this Court or any state or federal appellate court. Indeed, the correctness of the Appellate Court's preemption ruling is manifest from the very grounds upon which petitioner seeks, in the absence of a conflict, to establish the purported need for review by this Court in this case. For example, petitioner asserts that review should be granted because the nationwide systems of microwave telecommunications maintained by MCI and others, pursuant to federal licensing and regulation, constitute threats to the national defense, health and economic well-being. (Pet. 9-13.) These fanciful arguments do nothing to advance petitioner's argument in favor of Supreme Court review in this case, but they demonstrate with abundant

clarity the correctness of the Illinois Appellate Court's preemption ruling. If such arguments are to be heard at all, they clearly must be addressed in a federal forum, and not under the guise of a state court trespass action.

I.

THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH ANY PRIOR DECISION OF THIS COURT.

The Illinois Appellate Court found that petitioner's challenge to the transmission of interstate telecommunications was preempted by the Federal Communications Act, 47 U.S.C. §§ 151, *et seq.* The Appellate Court reasoned that the Act showed Congress's intent to exclude states from regulating the actual transmission of telecommunications signals, and also that the state law burdens petitioner sought to impose on interstate telecommunications would frustrate the central purposes of the Act. (Pet. App. 4a-8a.)

The reasoning of the Appellate Court fully accords with this Court's prior decisions finding federal preemption. For example, in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), this Court recently held that certain state regulation of cable television signals and programming was preempted by the Federal Communications Act and FCC regulations. In so holding, this Court set out the "familiar and well-established principles" governing federal preemption (467 U.S. at 698-99; citations omitted):

> [T]he enforcement of a state regulation may be preempted by federal law in several circumstances: first, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law . . .; second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field

> of regulation and has thereby "left no room for the States to supplement" federal law . . .; and, finally, when compliance with both state and federal law is impossible, . . . or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

In another recent case, *Edgar v. Mite Corp.*, 457 U.S. 624 (1982), this Court based its decision on the final part of the three-pronged preemption test. In *Edgar*, the Court struck down an Illinois state takeover statute because its requirements were substantially more stringent than those of the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f). The Court observed that while it was theoretically possible to comply with the provisions of both statutes, the Illinois statute still "frustrates the objectives of the Williams Act" by upsetting "the careful balance struck by Congress" between rights of investors to information and of others to bid freely in the open securities markets. (457 U.S. at 632, 634). Because of this substantial frustration of congressional "purposes and objectives," the Illinois law was preempted. (457 U.S. at 634.)

Federal preemption of matters affecting uniform and efficient telecommunications services is well-established, and its application here to the interstate transmission of signals presents no significant legal question warranting review by this Court. The transmission of microwave signals is a core activity of the rapid, efficient nationwide system of telecommunications services that is the goal of the Federal Communications Act. (47 U.S.C. §§ 151, *et seq.*) Among other sections, Section 214 of the Act clearly evidences Congress's intent to preempt any disruptive state regulation of these core activities. (47 U.S.C. § 214.) Section 214 requires telecommunications carriers to obtain FCC certificates before constructing and operating "any channel of communication established by the use of appro-

priate equipment" making up interstate telecommunications systems, and the FCC can impose on the certificate any conditions required by "the public convenience or necessity." (47 U.S.C. § 214(c).) Hence, the Act calls for the FCC, not the states, to impose conditions on the operations of interstate telecommunications systems, including the radio wave transmission system at issue here.[3] Indeed, MCI has operated its microwave transmission system since the early 1970's under certificates granted by the FCC pursuant to Section 214 of the Act. *See, e.g., MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 369 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

More generally, the federal government has occupied the field of interstate telecommunications by the long-standing and comprehensive statutory framework enacted by Congress and by regulations promulgated and administered by the FCC, "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide,

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[3] The cases upon which petitioner relies (Pet. 25-33, 38-39) are not to the contrary. For example, *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), dealt almost entirely with another federal statute, the Copyright Act, 17 U.S.C. §§ 101, *et seq.* Petitioner's reliance (Pet. 28-29) on this case is necessarily limited to a footnote in the opinion, which has nothing to do with preemption and is limited to the observation that the FCC cannot affect rights under the Copyright Act.

Petitioner's reliance (Pet. 29-33) on *Louisiana Public Service Commission v. FCC*, ___ U.S. ___, 106 S. Ct. 1890 (1986), is also misplaced. That case involved this Court's recognition of separate systems of accounting principles, one for interstate service and one for intrastate service. Here, by contrast, petitioner seeks to impose state common law regulation on the physical transmission of interstate telecommunications services. The authorization of the physical means of transmitting interstate services is a matter reserved to the FCC. (47 U.S.C. § 214.)

and world-wide wire and radio communication service with adequate facilities at reasonable charges." (47 U.S.C. § 151.) The Act applies "to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication." (47 U.S.C § 152(a).)

The federal courts have consistently found that the federal government has preempted state regulation of the physical provision of interstate telecommunications. The courts have repeatedly held that "the establishment of this broad scheme [of federal law] for the regulation of interstate service by communications carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state law." *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 490 (2d Cir. 1968).[4] In sum, as this Court has recognized, the Federal Communications Act has established a "comprehensive scheme for the regulation of interstate communication." *Benanti v. United States*, 355 U.S. 96, 104 (1957) (footnote omitted).

Finally, the onerous restrictions which petitioner seeks to impose on the interstate transmission of telecommunications signals plainly would frustrate the purposes and objectives of Congress. The Act explicitly states that its purpose is to make available "a rapid, efficient, Nation-wide and world-wide wire and radio communication service with

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[4] *Accord Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1064-65 (2d Cir. 1980); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1045 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 793 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *Vaigneur v. Western Union Telegraph Co.*, 34 F. Supp. 92, 93-94 (E.D. Tenn. 1940).

adequate facilities at reasonable charges." (47 U.S.C. § 151.) As the Appellate Court observed, the numerous transactions and burdensome charges that petitioner seeks to impose would cause "the most direct, obvious and drastic disruption of interstate telecommunications imaginable." (Pet. App. 6a.) Indeed, this Court need look no further than the petition in this case to visualize the degree of disruption threatened by state lawsuits such as these. Petitioner candidly admits (Pet. 9-13) that he seeks to use this lawsuit to try issues relating to alleged dangers to the national security, health and economic well-being allegedly caused by this federally-licensed and regulated system of telecommunications.

The decision below is clearly correct and fully accords with this Court's prior decisions.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY PRIOR DECISION OF ANY STATE OR FEDERAL APPELLATE COURT.

Petitioner cannot point to a single state or federal appellate court decision that conflicts with the decision below. Instead, petitioner attempts to rely (Pet. 38) on two Florida intermediate appellate court decisions which do not involve telecommunications and have nothing whatever to do with the issue presented in this case. *Florida Power & Light Company v. Roberts*, 490 So. 2d 969 (Fla. App. 1986), and *Florida Power & Light Co. v. Jennings* 485 So. 2d 1374 (Fla. App. 1986), involved condemnation of easements for electric power lines pursuant to well-established state laws. In neither of those cases was any issue raised with respect to any overriding federal interest. Finally, petitioner attempts to rely (Pet. 38-39) on an unpublished verdict or order from a Texas trial court

(*Klein Independent School District v. Houston Power and Lighting Company*, County Civil Court, Harris County, Texas, No. 393-755), another electric power line easement case in which no question of federal preemption was raised.[5]

In sum, there is no conflict warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 18, 1987

[5] Petitioner also apparently asserts (Pet. 16-17), without any support, that the approach taken by the Illinois courts in this case will somehow result in a wholesale federal takeover of Illinois real estate law. Even if that were a real danger, which it clearly is not, the Illinois courts certainly can be expected to deal with it.